Table of Authorities Cited

Cases

Pages

Bailey v. Anderson (1945), 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 10

Fay v. Noia (1963), 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822 14

Hammerstein v. Superior Court of California (1951), 341 U.S. 491, 71 S.Ct. 820, 75 L.Ed. 1135, rehearing denied 342 U.S. 843, 72 S.Ct. 21, 96 L.Ed. 637..... 15

Kendall v. United States, 107 U.S. 123, 17 Otto 123, 27 L.

Live Oak Water Users' Assn. v. Railroad Commission of California (1925), 269 U.S. 354, 46 S.Ct. 149, 70 L.Ed. 305 10

McFarland v. Holcomb (1898), 123 Cal. 84, 55 Pac. 761.... 13

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897..... 15

Stembridge v. Georgia (1952), 343 U.S. 541, 96 L.Ed. 1130, 72 S.Ct. 834 14

Codes

California Code of Civil Procedure:
Section 473 11
Section 475 11

California Government Code:
Section 19630 .....12, 13

Rules

Rules of the Supreme Court, Rule 19, 28 U.S.C. 15

Statutes

28 U.S.C., Section 1257(3) 2

Cal. Stats. 1897, page 44 11

Cal. Stats. 1961, Ch. 625, page 1783 12

Cal. Stats. 1961, Ch. 722, page 1965 11

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 598

GERHARD BRASCH,
Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

BRIEF FOR RESPONDENT
STATE COMPENSATION INSURANCE FUND
IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of California

OPINIONS BELOW

The Municipal Court of the City and County of San Francisco, California (the trial court) made and entered its Judgment of Dismissal on November 12, 1964, without opinion after demurrer sustained with leave to plaintiff (petitioner herein) to amend his complaint, no amended complaint having been filed within the time allowed. The Superior Court of the State of California in and for the City and County of San Francisco, Appellate Department, on March 12, 1965, without opinion ordered Judgment Affirmed. On May 4, 1965, said Appellate Department without opinion denied Mr. Brasch's application for rehearing and also denied certification to the California District Court of Appeal. On June 2, 1965, without opinion, the California District Court of Appeal denied Mr. Brasch's petition for writ of certiorari. On June 30, 1965, the California Supreme Court denied Mr. Brasch's petition for a hearing without opinion.

JURISDICTION

The order of the California Supreme Court denying Mr. Brasch's petition for a hearing was made and entered June 30, 1965.

The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1257 (3).

QUESTION PRESENTED

Whether the petition for writ of certiorari presents any question compelling the exercise of jurisdiction by this Court where:

1. Not one of the questions presented in said petition was pleaded in, or raised by, petitioner's complaint filed in the trial court, which court granted a judgment of dismissal after demurrer sustained with leave to amend but petitioner failed to amend his complaint within the time allowed;

2. The record contains no showing that a federal question was presented to the trial court although petitioner did mention the Constitution of the United States in his Notice of Appeal from the Judgment of Dismissal rendered by the trial court, the Constitution being mentioned in a statement of "History of the Case" but not in the statement of "Reasons" for the appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

This case purports to involve "the pertinent portions of the Fifth and Fourteenth Amendments to the Constitution of the United States." (Petition for Writ of Certiorari, page 5.)

STATEMENT OF THE CASE

Petitioner, Gerhard Brasch, in propria persona, filed his Complaint for Damages in the Municipal Court of the City and County of San Francisco, State of California. The defendants named therein were State Compensation Insurance Fund and State Personnel Board. That complaint contains nine alleged causes of action. A copy of that complaint is printed in the Appendix at pages i to vi.

That complaint does not draw into question the validity of a treaty or statute of the United States. It does not draw into question the validity of a State statute upon the ground of its being repugnant to the Constitution, treaties or laws of the United States. It does not specially set up or claim any title, right, privilege or immunity under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

State Compensation Insurance Fund demurred to said complaint and to each alleged cause of action thereof upon six separate grounds:

1. The Court lacked jurisdiction in that plaintiff failed to allege that he had exhausted his administrative remedies.

2. Failure to state facts sufficient to constitute a cause of action.

3. Any alleged cause of action appeared to be barred by the Statute of Limitations.

4. The complaint was ambiguous.

5. The complaint was unintelligible.

6. The complaint was uncertain.

On August 14, 1964, the demurrer was sustained with twenty days leave allowed to Mr. Brasch in which to amend his complaint. Thereafter, upon the request of an attorney acting for Mr. Brasch, time was extended to plaintiff to and including September 11, 1964 within which to amend his complaint. Mr. Brasch later claimed that on October 26, 1964, he *informed* the Court that he would amend his complaint as soon as he received certain papers from said attorney and that said attorney "no longer has power of attorney to represent him."

No amendment to the complaint was ever filed. No amended complaint was ever filed. On November 12, 1964, upon *ex parte* motion of State Compensation Insurance Fund, the Court made and entered its Judgment of Dismissal dismissing the action with prejudice.

Mr. Brasch failed to move the Court to set aside said judgment. On November 23, 1964, he filed a Notice of Appeal, appealing to the Superior Court of the State of California, in and for the City and County of San Francisco, from said Judgment of Dismissal.

In said Notice of Appeal, Mr. Brasch set forth a total of seven reasons for his appeal. Not one of those seven reasons made any mention of the Constitution, treaties or laws of the United States. Not one of said seven reasons set up or claimed any title, right, privilege or immunity under the Constitution, treaties or

statutes of, or commission held or authority exercised under the United States. Under the heading, "History of the Case," Mr. Brasch did state:

> "The many futile endeavors by the plaintiff to find an attorney willing to file a complaint in the above entitled matter and the facts explained above prove, in the opinion of the plaintiff, beyond any doubt that he is the only layman in the annals of jurisprudence who could not find an attorney willing to protect his rights under the laws and the Constitution of the State of California and under the Constitution of the United States in court and who never received a fair hearing by the State of California concerning his grievances, explained in his complaint, which means that he was denied the equal protection of the laws and deprived of property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States."

Mr. Brasch added a prayer in which he included a request that the court

> ". . . protect the rights of plaintiff . . . under the Constitution of the United States . . ."

In Appellant's Opening Brief which Mr. Brasch filed in the said California Superior Court he mentioned the Fifth and the Fourteenth Amendments to the Constitution of the United States. His statements in that regard were in reference to his view as to why or how he had a cause of action and suffered the damages for which he had prayed in his complaint. His references to those Amendments *failed to relate to any claim of error on the part of the trial court.*

State Compensation Insurance Fund filed its Answering Brief. No mention was made therein to the Constitution, treaties or laws of the United States.

Mr. Brasch then filed Appellant's Answering Brief in which he attempts to show, for the *first* time, that because of the Fifth and Fourteenth Amendments the "statute of limitations of six years of the United States applies to the causes of action of the appellant, and his causes of action are not barred by the statute of limitations." He also, for the first time, claimed that the statute of limitations was "interrupted" on December 2, 1961 because he had submitted a petition to the Chief Justice of the District Court of the United States in San Francisco, California, requesting that Court to act because his cause involved violations of his rights under the Fourteenth Amendment. Contrary to petitioner's Statement (Petition, page 14), we are unable to discover where or how "petitioner specifically claimed that the respondent State Compensation Insurance Fund violated his rights under two provisions of the Fourteenth Amendment. . . ."

The Appellate Department of said Superior Court denied the appeal of Mr. Brasch. Mr. Brasch still did not move the trial court to set aside the Judgment of Dismissal. Mr. Brasch then filed with said Superior Court his petition for rehearing or in the alternative for certification to the District Court of Appeal of the State of California. On May 4, 1965, the Court denied rehearing and denied certification. On May 11, 1965, the time in which Mr. Brasch could have moved

the trial court to set aside the Judgment of Dismissal expired without such motion ever being made.

Mr. Brasch petitioned for a writ of certiorari, which petition was denied by the District Court of Appeal for the State of California. He then petitioned for a hearing by the California Supreme Court, which petition was denied. His petition to this Court followed.

SPECIFICATION OF ERRORS URGED BY PETITIONER

Although it is difficult to condense them, it appears that petitioner's contentions are four in number:

1. That respondent State Compensation Insurance Fund denied him the equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States by refusing to appoint or promote him because of his age.

2. That said State Fund, by such refusal, and the State Personnel Board, by demoting him in rank on an employment list, deprived him of property without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. That "the statute of limitations of six years of the United States applies to his cause."

4. That said State Fund by informing the Governor of California "that it is not in the Fund's best interest to offer petitioner reassignment or promotion" denied him due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

ARGUMENT

1. NO FEDERAL QUESTION WAS PROPERLY RAISED OR PRESERVED IN THE STATE COURTS.

None of petitioner's contentions as stated immediately above was set forth in his Complaint for Damages filed by him in the trial court. (Appendix, pages i to vi.) He never amended that complaint although given leave to do so. Even now, Mr. Brasch does not contend that any of those contentions were presented to the trial court prior to judgment therein. (Petition, pages 5-7.) Thus, those contentions were never properly presented for determination by any Court. Not having been presented properly below, they are not now properly before this Court. *Bailey v. Anderson* (1945), 326 U.S. 203, 206-207, 66 S.Ct. 66, 90 L.Ed. 3, 6.

Briefs filed in the state courts form no part of the state court record for the purpose of Supreme Court review and they cannot be relied upon to establish that a federal question was raised, even if they are incorporated into the record sent to this Court. *Live Oak Water Users' Assn. v. Railroad Commission of California* (1925), 269 U.S. 354, 357-358, 46 S.Ct. 149, 70 L.Ed. 305, 309.

When Mr. Brasch appealed from the trial court's Judgment of Dismissal, the only actual question before the Appellate Department of the California Superior Court was whether that judgment was proper. That judgment was predicated upon Mr. Brasch's failure to amend his complaint within the time allowed after the demurrer to the complaint had been

sustained. Mr. Brasch's petition does *not* show that he ever even entertained a thought of a federal question prior to the entry of that judgment adverse to *him*.

---

2. THE PETITION FAILS TO DEMONSTRATE THAT THE DECISIONS BELOW DID NOT REST UPON A STATE GROUND WHICH INDEPENDENTLY AND ADEQUATELY SUPPORTS THE JUDGMENT.

Mr. Brasch's petition (page 6) shows that the (California) statute of limitations was but one of the grounds upon which the State Fund demurred to his complaint. Nowhere does he set out the basis upon which the demurrer was sustained. He did not do so in his appeal nor in his petitions to the California Courts. The State Fund had demurred upon six grounds. If any of the other five grounds was sufficient, Mr. Brasch's appeal was properly denied by the Appellate Department of the California Superior Court without even reaching the question of the statute of limitations. (California Code of Civil Procedure, section 475; Cal. Stats. 1897, page 44. See Appendix, page vii.)

At no time did Mr. Brasch move the trial court to set aside its Judgment of Dismissal. He had time to so move even after rehearing of his appeal was denied on May 4, 1965. California Code of Civil Procedure, section 473 (Cal. Stats, 1961, ch. 722, page 1965), reads in part:

> ". . . The court may, upon such terms as may be just, relieve a party or his legal representative

> from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken; . . ."

Assuming, *arguendo,* that Mr. Brasch's appeal did turn upon the statute of limitations, his contention that "the statute of limitations of six years of the United States applies to his cause" is fallacious.

Petitioner has not pointed out any statute of the United States providing for a limitation of six years. The case cited at page 29 of his petition (*Kendall v. United States,* 107 U.S. 123, 125, 17 Otto 123, 27 L. Ed. 437) is *not* in point. That case dealt with claims against the United States, cognizable by the Court of Claims. It did not deal with a claim of any person who on appeal from a judgment of dismissal by a state trial court claimed for the first time that the Constitution of the United States gives him a six-year period of limitations within which to bring an action against an employer other than the United States for damages resulting from failure to promote that person as an employee.

California Government Code section 19630 (Cal. Stats. 1961, ch. 625, page 1783) reads:

> "No action or proceeding shall be brought by any person having or claiming to have a cause of

> action or complaint or ground for issuance of any complaint or legal remedy for wrongs or grievances based on or related to any civil service law in this State or the administration thereof unless such action or proceeding is commenced and served within one year after such cause of action or complaint or ground for issuance of any writ or legal remedy first arose. Such a person shall not be compensated for the time subsequent to the date when such cause or ground arose. Where an appeal is taken from a decision of the board the cause of action does not arise until the final decision of the board."

Where it clearly appears on the face of the complaint that the cause of action is barred by the statute of limitations, the objection may be taken by demurrer. *McFarland v. Holcomb* (1898), 123 Cal. 84, 55 Pac. 761. Mr. Brasch in his complaint alleged the times of various examinations, incidents and transactions, all as occurring before July 28, 1961. His complaint was filed July 29, 1964, more than three years after the most recent conceivably-alleged cause of action arose. A memorandum of points and authorities which had been filed with, and in support of, the demurrer of the State Fund also brought to the attention of the trial court that California also has a general three-year statute of limitations in addition to Government Code section 19630, *supra*.

This Court has said that where the highest court of a state delivers no opinion in rendering a judgment, and it appears that the judgment *might* have rested upon a nonfederal ground, the Court will not take

jurisdiction to review the judgment. *Stembridge v. Georgia* (1952), 343 U.S. 541, 96 L.Ed. 1130, 72 S.Ct. 834; *Fay v. Noia* (1963), 372 U.S. 391, 428, 9 L.Ed.2d 837, 863, 83 S.Ct. 822.

In the case at bar, each and all of the judgments of the appellate courts could have rested upon one or more of the following independent and adequate state grounds:

1. Alleged causes of action barred by limitations of time.

2. No cause of action stated.

3. Remedies not exhausted prior to suit.

4. Remedies not exhausted prior to appeal.

5. Complaint ambiguous, uncertain or unintelligible.

6. No prejudicial error.

7. Failure to amend complaint before expiration of leave to amend.

3. THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The granting of certiorari is discretionary and even if jurisdiction on the petition for the writ were present, such presence does not determine the exercise of such jurisdiction. *Hammerstein v. Superior Court of California* (1951), 341 U.S. 491, 492, 71 S.Ct. 820, 75 L.Ed. 1135, 1137; rehearing denied 342 U.S. 843, 72 S.Ct. 21, 96 L.Ed. 637.

Certiorari should not be granted except in cases involving principles the settlement of which is of importance to the public, as distinguished from the parties. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897, 904.

Mr. Brasch's petition fails to contain any special and important reason for the granting thereof. (Rules of the Supreme Court, Rule 19, 28 U.S.C.)

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
October 11, 1965.

Respectfully submitted,
T. GROEZINGER,
LOTON WELLS,
Counsel for Respondent
State Compensation Insurance Fund.

J. J. VONK,
DAVID GREEN,
Of Counsel.

(Appendix Follows)

Appendix

Gerhard Brasch, in propria persona
3035 Gough Street, Apt. 8
San Francisco, California 94123
Telephone: 673-2085

In the Municipal Court of the City and County of
San Francisco
State of California

No. 519083

GERHARD BRASCH,
Plaintiff,
vs.
STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Defendants.

COMPLAINT FOR DAMAGES

Plaintiff complains and alleges:

I.

For a first cause of action that he, 48, during his employment as Intermediate Clerk with the State Compensation Insurance Fund in San Francisco, California, from April, 1957 to January, 1961, passed a written examination and an interview before a qualification appraisal panel for the class Compensation Insurance Technician and that his rank on the open list dated January 15, 1958 was 005; that the Per-

sonnel Officer of the State Compensation Insurance Fund a few days after the establishment of this list informed the plaintiff that he had to fill several openings in the claims department from this list and that he asked the plaintiff to waive his right for employment in the claims department since the public would not understand him on the phone because the plaintiff has an accent; that the plaintiff refused to waive; that the Personnel Officer understood the plaintiff without any difficulty; that the Personnel Officer explained to the plaintiff among other things that "I have the power to exhaust the whole list completely, to go down the list all the way without considering you for any other position unless you waive"; that the plaintiff finally waived because the Personnel Officer and the Assistant Personnel Officer promised to give him the first opening in the payroll department for which work they considered him qualified if he would waive his right for employment in the claims department; that in the fall of 1958 the Personnel Officer and the Superintendent of the payroll department interviewed the plaintiff for an opening in the payroll department; that the plaintiff was not offered a position and that the list expired.

II.

And for a second cause of action that he filed a grievance concerning his waiver alleged in I, supra, with Mr. John F. Fisher, Executive Officer of the State Personnel Board, Sacramento, California by certified mail with return receipt on May 27, 1959; that he enquired on January 2, 1960 of Mr. Fisher

what decision Mr. Fisher had made; that Mr. Fisher informed the plaintiff that they had no record of his letter, and that the plaintiff sent Mr. Fisher a copy; that thereupon Mr. Fisher advised the plaintiff that the statute of limitations barred acting upon his grievance and that there was no evidence of the waiver of the plaintiff or of any illegal appointments in the records.

III.

And for a third cause of action that a few weeks after he had passed a written examination for the Compensation Insurance Assistant class in March of 1959 the Superintendent of Underwriting at that time explained to the plaintiff at the end of an interview for this position, "I understand you. If I give you a job in my department, you would be promoted and you would have to talk to the public. The public will not understand you because you have an accent. I cannot give you a job in my department;" that he would make an effort with the Personnel Officer to get the plaintiff a job in the accounting or in the payroll department; that the plaintiff was disqualified in the interview for this class by a qualification appraisal panel.

IV.

And for a fourth cause of action that on December 30, 1959 he took a test for the Compensation Insurance Assistant class and that the successor of the Superintendent of Underwriting in III, supra, informed the plaintiff on the next day that he had passed the test; that he refused to appoint the plain-

tiff, explaining to him that "You have twenty more years on your back. We have to get the best of the applicants, and you do not compare favorably with them. You have to go back to your file room;" that he also explained to the plaintiff that the qualification appraisal panel has instructions as to the type of people the Fund wants and that the panel in their disqualifying reasons could not state that the plaintiff is too old; that the Superintendent mentioned furthermore, "You have been so long in the file room; apparently you are not getting any place. You are running against a wall;" that the Superintendent suggested very definitely to the plaintiff to look for work somewhere else; that he was disqualified in the interview for the Compensation Insurance Assistant class by a qualification appraisal panel.

V.

And for a fifth cause of action that he filed a grievance concerning discrimination on basis of age in the State civil service with Mr. John F. Fisher, Executive Officer of the State Personnel Board in Sacramento, California, explaining that "I feel aggrieved because instead of encouraging me in my efforts to advance in the State civil service one suggested to me that I look for work somewhere else although I have been doing a good job in my basement file room for about two years and eight months, passed an interview for Compensation Insurance Technician, and the State Personnel Board granted my appeal from the disqualification in the interview for the Accounting Technician II class with the Fund"; that Mr. Fisher

rejected the grievance of plaintiff two weeks later, writing that ". . . it does not appear that your grievance is in an area over which the State Personnel Board has jurisdiction. . . . we found no evidence in your letter of a violation of civil service procedures." That plaintiff enquired on January 30, 1960 and on February 27, 1960 of Mr. Fisher about the authority having jurisdiction over his grievance; that he received no reply.

VI.

And for a sixth cause of action that he wrote on January 24, 1961 to Mr. John F. Fisher, Executive Officer of the State Personnel Board, Sacramento, California that "my rank on the Accounting Technician II promotional employment list of the State Compensation Insurance Fund dated June 6, 1960 was 2 and is now 1. As to my knowledge positions for Accounting Technician II and Accounting Technician III were filled by people not on this list. I would appreciate it very much if you would kindly let me know why I was bypassed although my rank on the list was 2 and later 1." That the plaintiff was informed on February 2, 1961 that two appointments had been made from an *older* Accounting Technician II list for the State Compensation Insurance Fund dated December 1, 1958 on which the eligibility of the plaintiff had been established on February 19, 1959.

VII.

And for a seventh cause of action that he furthermore was informed in the letter dated February 2,

1961, mentioned in VI, supra, that "Your name will be retained on the Accounting Technician II spot list for Fresno. Your standing on this list is currently number four." That the rank of plaintiff on the Accounting Technician II list for Fresno dated November 12, 1959 was 2.

VIII.

And for an eighth cause of action that he informed the members of the State Personnel Board during the hearing of his appeal from his disqualification in the interview for the Compensation Insurance Assistant class on October 8, 1959 that the transcript of this interview contained several statements which he had not made; that a member of the Board made a statement such as, "How could that happen?"

IX.

And for a ninth cause of action that the defendants did the acts herein alleged maliciously and oppressively. Plaintiff therefore is entitled to exemplary and punitive damages in an additional sum as the Honorable Court may determine.

Wherefore, plaintiff prays judgment against the defendants for loss of earnings for the sum of $2,150.00 plus interest at the rate of 5% since January 1, 1961 together with costs of suit incurred herein, and for such other relief as may be proper.

Gerhard Brasch

Municipal Court Filed—Summons Issued Jul 29 1964
James M. Cannon, Clerk
By J. Kostolefsky, Deputy

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 475. **No error or defect to be regarded unless it affects substantial rights.** The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of said court, does not affect the substantial rights of the parties. No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown. [Enacted 1872; Am. Stats. 1897, p. 44.]

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 3 1965
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 598

GERHARD BRASCH,
Petitioner,
vs.
STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

On Writ of Certiorari to the Supreme Court
of the State of California

REPLY BRIEF FOR PETITIONER

GERHARD BRASCH,
3035 Gough Street, Apt. 8,
San Francisco, California 94123,
Petitioner in propria persona.

PERRAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

I.

Page

Petitioner did not act in propria persona in the Municipal Court after filing his complaint; he was represented by attorneys 1

II.

Petitioner for reasons beyond his control could and did not act in propria persona before the Municipal Court in opposition to the assertions of the respondent State Compensation Insurance Fund 5

III.

Petitioner's attorneys did not protect the rights of petitioner 6

IV.

It was not necessary for petitioner to move the Municipal Court to set aside the judgment of dismissal with prejudice 7

V.

Concerning the argument of the respondent State Compensation Insurance Fund that "no federal question was properly raised or preserved in the state courts" 7

VI.

Concerning the argument of the respondent State Compensation Insurance Fund that "the petition fails to demonstrate that the decisions below did not rest upon a state ground which independently and adequately supports the judgment" 10

VII.

Concerning the argument of the respondent State Compensation Insurance Fund that "the petition does not present a substantial federal question" 15

Conclusion 18

Appendix

	Page
Letter to the Honorable Leland J. Lazarus, Presiding Judge of the Municipal Court, dated October 26, 1964	i
Letter by Attorney General of California to Messrs. Hallinan, Shapiro and Hallinan, dated August 18, 1964	ii
Stipulation between Attorney General and Hallinan, September 29, 1964	iv
Code of Civil Procedure 988h (Scope of Review)	vi
Philbrick v. State Personnel Board	vii

Table of Authorities Cited

Cases	Pages
Bailey v. Anderson (1945), 326 U.S. 203	7
Chambers v. Florida, 309 U.S. 227	18
Fay v. Noia (1963), 372 U.S. 391	14, 15
Hammerstein v. Superior Court of California, et al. (1951), 341 U.S. 491	15
Kendall v. United States, 107 U.S. 123	12
Live Oak Water User's Assn. v. Railroad Commission of California (1925), 269 U.S. 354	8
McFarland v. Holcomb (1898), 123 Cal. 84	12
Milk Wagon Drivers' Union of Chicago v. Meadowmoor Dairies, Inc., 312 U.S. 287	18
Oppenheimer v. Deutchman, 132 C.A. 2d Supp. 875	9
Philbrick v. State Personnel Board (1942), 53 C.A. 2d 222, 127 P. 2d 634	12
Rice v. Sioux City Memorial Park Cemetery, Inc., et al., 349 U.S. 70	16
Stembridge v. Georgia (1952), 343 U.S. 541	12, 13
United States v. Lynah, 188 U.S. 445	10
Yick Wo v. Hopkins, Sheriff, 118 U.S. 356 (1885)	10

Codes

California Code of Civil Procedure:	
Section 475	10, 11
Section 988h	7, 11
California Government Code:	
Section 19630	12

Constitutions

United States Constitution, Fourteenth Amendment	10, 14, 18

Rules

	Pages
Rules of the Supreme Court, 28 U.S.C., Rule 19	17

Statutes

28 U.S.C., Section 1257	16
28 U.S.C., Section 2401	11
31 U.S.C., Section 235	11

Texts

Deering's California Codes Annotated, Government Code, Sections 15260 to 22990, page 436	12

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 598

GERHARD BRASCH,
Petitioner,

vs.

STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

REPLY BRIEF FOR PETITIONER

I.

PETITIONER DID NOT ACT IN PROPRIA PERSONA IN THE MUNICIPAL COURT AFTER FILING HIS COMPLAINT; HE WAS REPRESENTED BY ATTORNEYS.

The respondent State Compensation Insurance Fund asserts throughout its brief in opposition that petitioner, having filed his complaint in the Municipal

Court in propria persona, continued to act in propria persona before the court, even though petitioner had explained in his petition (last paragraph, pages 6-7) that an attorney represented him in court after he had filed his complaint.

This matter requires clarification. Petitioner explained on page 5 of his petition that "he could not find an attorney willing to file a complaint in his cause even though he had paid the fees of two attorneys". Of the many attorneys in San Francisco whom he asked to file a complaint in his matter, two attorneys successively in 1961 agreed to file a complaint. He gave them his papers and paid their fees. The first attorney wrote to the petitioner about two months after he had written to the respondent State Compensation Insurance Fund that he had no substantial cause of action for money damages. The second attorney informed the petitioner about three weeks after he had written to the respondent State Personnel Board that any redress now seems unavailable and that nothing further could be done in his matter. Petitioner could find no other attorney willing to file a complaint.

After petitioner had filed his complaint, the respondent State Compensation Insurance Fund demurred. Messrs. Vincent Hallinan, Carl B. Shapiro, and Patrick Sarsfield Hallinan, Attorneys at Law, 345 Franklin Street, San Francisco, California 94102 agreed to represent petitioner in his complaint against the respondents State Compensation Insurance Fund and State Personnel Board. Petitioner gave his litiga-

tion papers to Mr. Brian D. Rohan, an attorney in the offices of Messrs. Hallinan, Shapiro and Hallinan. In the hearing of the demurrer on August 14, 1964 Mr. Brian D. Rohan appeared for petitioner and upon his request was granted an extension of twenty days for amending the complaint after the court had sustained the demurrer. On August 17, 1964 petitioner paid the requested fee of $50 to Messrs. Hallinan, Shapiro and Hallinan for filing the amendment. On September 3, 1964 Mr. Rohan requested and was granted a second extension of time "to and including September 11, 1964" for amending the complaint. But Mr. Rohan filed no amendment even though petitioner told Mr. Rohan many times of his concern that the respondents after September 11, 1964 could move the court any day to dismiss his complaint. Mr. Rohan had always excuses for not filing the amendment and promised to file it. He told petitioner, "Don't worry. When the court dismisses your complaint, we file another one. I pay the filing fee." He explained to petitioner that his cause is called "inverse condemnation", that the respondents violated his rights under the Fourteenth Amendment to the Constitution of the United States, and that the statute of limitations of the United States applies to his cause. Since Mr. Rohan did not amend the complaint and did not return the litigation papers and the fee to him, petitioner filed a complaint against Mr. Rohan on October 26, 1964 in the Municipal Court in San Francisco for the return of his litigation papers and his fee. On the same day petitioner gave a letter, addressed to the

Honorable Leland J. Lazarus, Presiding Judge of the Municipal Court, to an employee in the office of the court in which he informed the court of his complaint against Mr. Rohan and of his intention to amend his complaint, acting again in propria persona, as soon as he had received his litigation papers, which was a request for an extension of time. (Appendix page i.)

A Judgment of Default by Court was entered against Mr. Rohan on November 12, 1964 (No. 524400, Bk. Vol. 614 D, page 29360). Petitioner sent Mr. Rohan a copy of this judgment, but Mr. Rohan did not reply. Petitioner was informed in the office of the court on November 20, 1964 that a writ of execution against Mr. Rohan could not be entered since he had not listed the litigation papers in the judgment against Mr. Rohan which he had drawn up. An employee in the office of the court wished to ascertain which litigation papers Mr. Rohan had been ordered to return and inspected the file in the action of petitioner against the respondents, whereupon petitioner was utterly perplexed when he noticed that the file contained a Judgment of Dismissal with Prejudice entered against him on November 12, 1964 upon ex parte motion of the respondent State Compensation Insurance Fund. The respondent State Compensation Insurance Fund had sent three copies of this judgment to his former attorneys, but petitioner received no copy from them.

Employees in the office of the court told petitioner that the court could do nothing concerning the two judgments. Therefore, he appealed from the Judgment of Dismissal with Prejudice against him on

November 23, 1964 and from the Judgment of Default by Court on the following day to the Appellate Department of the Superior Court in San Francisco, California.

On November 28, 1964 petitioner received by mail from his former attorneys his litigation papers and other papers, among them correspondence and a stipulation between Messrs. Hallinan, Shapiro and Hallinan and the Attorney General of which his former attorneys had not informed him before, namely:

Letters by the Attorney General to Messrs. Hallinan, Shapiro, and Hallinan dated August 18 and September 29, 1964. (Appendix, pages ii, iv.)

Stipulation Extending Time to Plead between Messrs. Hallinan, Shapiro, and Hallinan and the Attorney General of California. (Appendix, page v.)

II.

PETITIONER FOR REASONS BEYOND HIS CONTROL COULD AND DID NOT ACT IN PROPRIA PERSONA BEFORE THE MUNICIPAL COURT IN OPPOSITION TO THE ASSERTIONS OF THE RESPONDENT STATE COMPENSATION INSURANCE FUND.

The respondent State Compensation Insurance Fund states many times throughout its brief in opposition that petitioner was granted leave to amend his complaint, that petitioner failed to file an amended complaint, and on page 5 of its brief that "thereafter, upon the request of an attorney acting for Mr. Brasch, time was extended to plaintiff to and including Sep-

tember 11, 1964 within which to amend his complaint." The respondent State Compensation Insurance Fund, however, had knowledge at all times that petitioner was represented by attorneys after he had filed his complaint because according to the CERTIFICATE OF SERVICE BY MAIL OF JUDGMENT OF DISMISSAL it sent a copy of this judgment to Gerhard Brasch, c/o Brian Rohan, Esq. (petitioner did not receive this copy), another one to Hallinan, Shapiro and Hallinan, and a third copy to Brian Rohan, Esq. (Record, Municipal Court.)

III.

PETITIONER'S ATTORNEYS DID NOT PROTECT THE RIGHTS OF PETITIONER.

While petitioner's attorneys represented him, they never informed him of their correspondence with the Attorney General of California, counsel for the respondent State Personnel Board and the stipulation, cited in I, supra, in which they granted the State Personnel Board time "up to and including the thirtieth day following the filing by plaintiff of his amended complaint in the above matter, in which to demur, answer or otherwise plead". Since petitioner's attorneys did not enter into any stipulations with the counsels for the respondents to protect the rights of their client and did not amend his complaint, the respondent State Compensation Insurance Fund could move ex parte for a judgment of dismissal with prejudice any time after September 11, 1964.

IV.

IT WAS NOT NECESSARY FOR PETITIONER TO MOVE THE MUNICIPAL COURT TO SET ASIDE THE JUDGMENT OF DISMISSAL WITH PREJUDICE.

The respondent State Compensation Insurance Fund argues for the *first* time several times in its brief in opposition that petitioner failed to move the Municipal Court to set aside the Judgment of Dismissal with Prejudice. In his notice of appeal petitioner prayed that "the Superior Court may annul the Judgment of Dismissal, transfer the complaint to the Superior Court . . ." By these words petitioner prayed that the Superior Court may set his cause for trial in the Superior Court since California Code of Civil Procedure § 988h (Appendix, page vi) authorizes the Superior Court to reverse any judgment of a municipal court and order a new trial. Petitioner pointed out on page 8 of his petition that he had pleaded the error of the Municipal Court in entering a Judgment of Dismissal with Prejudice in his opening brief. It was, therefore, not necessary for petitioner to move the Municipal Court to set aside the Judgment of Dismissal with Prejudice.

V.

CONCERNING THE ARGUMENT OF THE RESPONDENT STATE COMPENSATION INSURANCE FUND THAT "NO FEDERAL QUESTION WAS PROPERLY RAISED OR PRESERVED IN THE STATE COURTS".

In support of the above argument, the respondent cites *Bailey v. Anderson* (1945), 326 U.S. 203, 206-

207, which deals with a condemnation proceeding, in which the appellant "was given full opportunity to be heard and to introduce evidence before the Commissioners" (page 205) and "appellant, for the first time, assailed on constitutional grounds the asserted denial of interest by his assignments of error in the State Supreme Court of Appeals" (page 206). This case and the case of petitioner are not comparable since this case deals with a condemnation award, the appellant had a hearing, in which he could introduce evidence and the question from what date interest should be allowed on the condemnation award was first submitted upon Constitutional grounds in the highest court of the State, whereas petitioner claimed at the first opportunity in the courts below that the respondents denied him the equal protection of the laws and deprived him of property for public use without compensation and due process of law in violation of the cited provisions of the Fourteenth Amendment to the Constitution of the United States and that he never had an opportunity to amend his complaint in the trial court and to introduce evidence.

The next cited case in this context, *Live Oak Water User's Assn. v. Railroad Commission of California* (1925), 269 U.S. 354, 357-358, deals with a rate fixing order made by a commission and in which the writ of error was dismissed since "the constitutionality of the order itself was not definitely drawn in question before the state court prior to a petition for rehearing which was denied without more" (pages 354-355). Evidently this case and the case of petitioner are not

comparable for the reasons stated in the preceding paragraph.

The respondent discusses next "the trial court's Judgment of Dismissal". The court did not enter a judgment of dismissal; the court entered a Judgment of Dismissal *with Prejudice* based upon the false citation in the Oppenheimer case (*Oppenheimer v. Deutchman,* 132 CA 2d Supp. 875, 876-877) by the respondent State Compensation Insurance Fund in its Memorandum of Points and Authorities (Dismissal of Complaint).

The respondent then notes that "Mr. Brasch's petition does *not* show that he ever even entertained a thought of a federal question prior to the entry of that judgment adverse to him". This presumption is not substantiated by the facts of his case. Petitioner's attorney had told him that his cause is an example of "inverse condemnation" by a state in violation of the Fourteenth Amendment of the Constitution of the United States, that the statute of limitations of the United States applies to his cause and that his cause is not barred by the statute of limitations; but his attorney filed no amendment to his complaint; he just kept on promising to file it.

VI

CONCERNING THE ARGUMENT OF THE RESPONDENT STATE COMPENSATION INSURANCE FUND THAT "THE PETITION FAILS TO DEMONSTRATE THAT THE DECISIONS BELOW DID NOT REST UPON A STATE GROUND WHICH INDEPENDENTLY AND ADEQUATELY SUPPORTS THE JUDGMENT".

The denial of the appeal of petitioner by the Appellate Division of the Superior Court is not in accord with the decisions of this Court quoted on page 31 of his petition.

In support of its argument that the appeal of petitioner was properly denied by the Appellate Division of the Superior Court, the respondent quotes California Code of Civil Procedure, section 475, for the first time. This section provides that "no error or defect to be regarded unless it affects substantial rights". Petitioner had claimed in the courts below that the respondents denied him the equal protection of the laws and deprived him of property for public use without compensation and due process of law in violation of the cited provisions of the Fourteenth Amendment to the Constitution of the United States. This Court said in *Yick Wo v. Hopkins, Sheriff,* 118 U.S. 356 (1885): "The guarantees of protection contained in the Fourteenth Amendment of the Constitution extend to all persons within the territorial jurisdiction of the United States, without regard to differences of race, of color, or of nationality."

And in *United States v. Lynah,* 188 U.S. 445, 465 this Court held:

> "The government may take personal or real property whenever its necessities or the exigiencies of the occasion demand . . . but the Constitution in the Fifth Amendment guarantees that when this right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation."

Since petitioner had claimed that the respondents denied him substantial rights, CCP 475 does not apply to his case.

Petitioner did not have to move the court of first instance to set aside the Judgment of Dismissal with Prejudice because he appealed from this Judgment with the Appellate Division of the Superior Court on basis of California Code of Civil Procedure §988h, which provides that

> "the superior court may review, . . . affirm, reverse or modify any judgment or order appealed from . . .". (Appendix, page vi.)

Title 31, U.S.C. §235: Limitation of suit states:

> "Every such suit shall be commenced within six years from the commission of the act, and not afterward, (R.S. §3494.) Derivation Act Mar. 2, 1863, ch. 67, §7, 12 Stat. 698."

Title 28, U.S.C. §2401. Time for commencing action against United States, provides:

> "(a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. . . ."

Petitioner cited *Kendall v. United States,* 107 U.S. 123, 125 because this Court affirmed in this case that the statute of limitations of the United States is six years.

Petitioner explained already on page 9 of his petition that Government Code section 19630 does not apply to his cause. He cited *Philbrick v. State Personnel Board* (1942) 53 CA 2d 222, 127 P 2d 634 on page 12, lines 11-16 of his opening brief in the Superior Court. The citation of *Philbrick v. State Personnel Board* is stated in Deering's California Codes Annotated, Government Code, §§15260 to 22990, page 436, following Government Code §19630. (Appendix, page vii.)

Petitioner explained already on page 14, lines 1-14 of his opening brief in the Superior Court that *McFarland v. Holcomb* (1898), 123 Cal. 84, and his case are not comparable.

In support of its argument that "this Court has said where the highest court of a state delivers no opinion in rendering a judgment and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment", the respondent cites the following two cases.

In the first case, *Stembridge v. Georgia* (1952), 343 U.S. 541, 547, Stembridge was convicted of involuntary manslaughter. The Georgia Court of Appeals affirmed the conviction, and the Supreme Court of Georgia denied certiorari. His motion in the trial

court for a new trial on the ground of newly discovered evidence was denied. The Court of Appeals affirmed the denial of this motion on adequate state grounds. Petitioner then in a motion for rehearing for the first time claimed violation of his federal constitutional rights. The Court of Appeals denied the motion without opinion, and the Supreme Court of Georgia denied certiorari without opinion. In an amendment thereafter the Circuit Court of Appeals stated that it had considered the federal question and decided it adversely to petitioner. "Without seeking a review of this amending order in the Supreme Court of Georgia, petitioner applied to this Court for certiorari, which was granted." This Court dismissed the case since the Supreme Court of Georgia had not been asked to pass on the amending order. This Court further held that the Supreme Court of Georgia in denying certiorari for rehearing *might* have rested its decision on adequate State grounds because "the attempt to raise the question of constitutional rights in the general terms of the above quotation from the petition for certiorari did not begin to meet the requirement of the Supreme Court of Georgia for definiteness. . . . At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds."

The respondent avers that the decision of this Court in *Stembridge v. Georgia* applies to the case of peti tioner; evidently this contention is completely unsound since petitioner claimed at the first opportunity in the court of first instance and in the appel-

late court (when his former attorneys had returned his litigation papers to him) that the respondents denied him the equal protection of the laws and deprived him of property for public use without compensation and without due process of law in violation of the cited provisions of the Fourteenth Amendment to the Constitution of the United States and since the courts below denied his appeal, petition for rehearing, petition for a writ of certiorari and petition for a hearing without opinion. Furthermore, this case and the case of petitioner are not comparable, as explained immediately above.

In the second cited case, *Fay v. Noia* (1963) 372 U.S. 391, 428, Noia and his codefendants were convicted in a New York State Court of murder committed during a robbery, and each was sentenced to life imprisonment; the sole evidence against each was his confession. Respondent did not appeal. The codefendants did not accomplish their appeals, but they were successful in subsequent proceedings and released on the ground that their confessions were coerced and their convictions violated the Fourteenth Amendment. Thereafter, the State Court denied Noia coram nobis review of his conviction since he had not appealed. A Federal District Court denied Noia a writ of habeas corpus holding that his failure to appeal was a failure to exhaust available state remedies. The Court of Appeals reversed. This Court affirmed the judgment of the Court of Appeals on other grounds. Obviously, for the grounds given in the preceding case, this case and the case of petitioner are not comparable.

Furthermore, the respondent asserted that this Court held in *Fay v. Noia* "That where the highest court of a state delivers no opinion in rendering a judgment, and it appears that the judgment *might* have rested upon a nonfederal ground, the Court will not take jurisdiction to review the judgment". However, this Court stated positively on page 428 as follows: "It is a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds."

Since the courts below denied the claims of petitioner without opinion that the respondents denied him the claimed, specific rights under the Fourteenth Amendment to the Constitution of the United States, as set forth in the preceding case, their decrees are not in accord with the holding of this Court in *Fay v. Noia.*

VII

CONCERNING THE ARGUMENT OF THE RESPONDENT STATE COMPENSATION INSURANCE FUND THAT "THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION".

On this point the respondent cites two decisions of this Court in support of its assertion that the petition of petitioner "fails to contain any special and important reasons for the granting thereof".

In the first case, *Hammerstein v. Superior Court of California, et al.* (1951) 341 U.S. 491, 492, petitioner

did not appeal from a default judgment of the Superior Court but applied to the District Court of Appeal for a writ of prohibition, which did consider the federal question in denying the writ. The Supreme Court of California denied a writ of certiorari on adequate state grounds, namely, the failure of petitioner to appeal from the default judgment. Petitioner applied for a writ of certiorari with this Court. This Court held that since petitioner had not appealed from the default judgment, there was no final judgment rendered "by the highest court of a State in which a decision could be had", 28 U. S. C. §1257, this Court had no jurisdiction "to review the proceedings arising from the default judgment".

Obviously, this case and the case of petitioner are not comparable since petitioner claimed denial of his Constitutional rights, as explained before, at the earliest opportunity in the courts below and the Supreme Court of California in its decree decided against these claimed rights without opinion.

The second case, *Rice v. Sioux City Memorial Park Cemetery, Inc. et al.*, 349 U.S. 70, 73 deals with an action by petitioner for damages for mental suffering flowing from the refusal of a cemetery to bury her husband, a Winnebago Indian, after services had been conducted at the graveside. The contract of sale of the burial lot also provided that "burial privileges accrue only to members of the Caucasian race". The trial court held that the clause was not void but was unenforceable as a violation of the Constitutions and public policy of Iowa and of the United States. The Supreme

Court of Iowa affirmed. This Court granted a writ of certiorari and affirmed the judgment of the Supreme Court of Iowa. Upon consideration of a petition for rehearing before a full Court, it appeared that Iowa had passed remedial legislation since the commencement of this litigation so that the ultimate question would not again arise in Iowa. The Court vacated the judgment of affirmance and dismissed the writ of certiorari since in this case the special and important reasons for granting the writ of certiorari required by Supreme Court Rule 19 no longer were present.

This case and the case of petitioner are not comparable because in his case the Supreme Court of California denied summarily and without opinion his claims that the State of California denied him the equal protection of the laws and deprived him of property for public use without compensation and due process of law in violation of the cited provisions of the Fourteenth Amendment to the Constitution of the United States and in disregard of the applicable decisions of this Court as he submitted in his reasons for granting the Writ. (Petition for a Writ of Certiorari pages 25-31).

Petitioner respectfully submits that the special and important reasons required by Rule 19 of the Rules of the Supreme Court, 28 U.S.C., for granting review on writ of certiorari are present in his case. Petitioner claimed that the Supreme Court of California without opinion denied his claims that the respondents denied him the equal protection of the laws and deprived him of property for public use without com-

pensation and due process of law in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States. Concerning claims involving the denial of Constitutional rights this Court said: "It is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made." The state courts "must act in subordination to the duty of this Court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. Compare *Chambers v. Florida,* 309 U.S. 227." *Milk Wagon Drivers' Union of Chicago v. Meadowmoor Dairies, Inc.* 312 U.S. 287, 293, 298-299.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
October 26, 1965.

GERHARD BRASCH,
Petitioner in propria persona.

(Appendix Follows)

Appendix

3035 Gough Street, Apt. 8
San Francisco, California 94123
October 26, 1964

The Honorable Leland J. Lazarus
Presiding Judge of the Municipal Court
City Hall
San Francisco, California

Re: Brasch vs. State Compensation Insurance Fund
State Personnel Board
Complaint No. 519083,
Municipal Court

Your Honor:

Mr. Brian D. Rohan no longer has power of attorney to represent me in the above matter. I had paid Mr. Rohan $50 on August 17, 1964 for filing an amendment to my complaint. Mr. Rohan promised me many times to file this amendment; however, he did not do it. Therefore I filed a complaint against Mr. Rohan today for the return of my payment and of my litigation papers. As soon as I shall have received my papers, I will submit an amendment to my complaint, acting again in propria persona. For the information of Your Honor I am enclosing a copy of this complaint.

May I take the liberty of mentioning that my suit against Mr. Rohan proves that I, who never formally studied law through class instruction or by correspondence, could not find an attorney willing to represent me in the above matter even though I had

paid the fee of more than one attorney in the belief that he would file a complaint.

Respectfully submitted,
Gerhard Brasch.

Enclosure.

Letterhead of
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
STATE BUILDING, SAN FRANCISCO 94102

August 18, 1964

Hallinan, Shapiro & Hallinan
Attorneys at Law
345 Franklin Street
San Francisco, California

Attention Mr. Brian D. Rohan

Re: Gerhard Brasch v. State Comp. Ins. Fund and State Personnel Board
San Francisco Municipal Ct. No. 519083

Dear Sirs:

This office represents the State Personnel Board in the above referred to action. We have been informed that you have been retained to represent the plaintiff and that the demurrer of the State Compensation Insurance Fund which was heard on August 14 was sustained with leave to amend.

Our time to answer on behalf of the State Personnel Board expires on August 28. It would save time and trouble for all parties if we could enter into an agree-

ment whereby the State Personnel Board would not have to appear until ten days after it is served with the Amended Complaint even though that may occur after August 28. If you are in agreement with this, will you please send us a letter to that effect.

Your courtesy in this matter is appreciated.

Very truly yours,
STANLEY MOSK,
Attorney General
By Robert L. Bergman,
Deputy Attorney General

RLB:MSM

Letterhead of
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
STATE BUILDING, SAN FRANCISCO 94102

September 29, 1964

Messrs. Hallinan, Shapiro & Hallinan
Attorneys at Law
345 Franklin Street
San Francisco, California

Attention Mr. Brian D. Rohan

Re: Gerhard Brasch v. State Compensation Insurance Fund and State Personnel Board
San Francisco Municipal Court No. 519083

Dear Mr. Rohan:

Enclosed is a stipulation extending time to plead, pursuant to our recent telephone conversation. If this meets with your approval, I would appreciate your dating, signing, and returning to me the original and two copies, including the one marked "ATTORNEY GENERAL—OFFICE COPY." The other copy is for your file.

Thank you very much for your courtesy.

Yours very truly,
THOMAS C. LYNCH
Attorney General
LEONARD M. SPERRY, Jr.
By Leonard M. Sperry, Jr.
Deputy Attorney General

LMS:FC
5 encls.

Thomas C. Lynch
Attorney General of California
Leonard M. Sperry, Jr.
Deputy Attorney General
6000 State Building
San Francisco 2, California
UNderhill 1-8700
Attorneys for Defendant,
State Personnel Board

In the Municipal Court of the City and County
of San Francisco
State of California

No. 519083

Gerhard Brasch,
Plaintiff
vs.
State Compensation Insurance Fund
and State Personnel Board,
Defendants

STIPULATION EXTENDING TIME TO PLEAD

It Is Hereby Stipulated by and between counsel for plaintiff and defendant State Personnel Board that said defendant may have up to and including the thirtieth day following the filing by plaintiff of his amended complaint in the above matter in which to

demur, answer, or otherwise plead. This stipulation may, but need not, be filed.

Dated: ....., 1964.

Hallinan, Shapiro & Hallinan
by Brian Rohan
Attorneys for Plaintiff
Thomas C. Lynch
Attorney General of California
Leonard M. Sperry, Jr.
Deputy Attorney General
Leonard M. Sperry, Jr.
Attorneys for Defendant
State Personnel Board

Deering's California Codes Annotated, Civil Procedure, §§ 802 to 1059 (1959), pages 541-542:

§ 988h. [*Scope of review and powers of superior court: New trials: Damages added to costs where appeal was taken for delay.*] Upon an appeal from a municipal court, the superior court may review the verdict or decision and any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the right of a party, including, on any appeal from the judgment, any order on motion for a new trial, and may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, and may, if necessary or proper, direct

a new trial or further proceedings to be had. The respondent, or party in whose favor the judgment was given, may, without appealing from such judgment, request the court to and it may review any of the foregoing matters for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken. If there be a new trial, it must be in the municipal court. If it appears to the superior court that any appeal was taken solely for delay, it may, on dismissal of such appeal or affirmance of the judgment or order appealed from, add to the costs of appeal such damages as may be just, not exceeding 25 percent of the judgment appealed from, if it be a judgment for money, or 25 percent of the value of the property if it be a judgment for the recovery of specific personal property.

Deering's California Codes Annotated, Government Code, §§ 15260 to 22990, at page 436:

This section was intended to apply only to the claims of individuals, particularly salary claims of employees or those who had been separated from the service. Philbrick v. State Personnel Board (1942) 53 CA2d 222, 127 P2d 634.

LIBRARY OF SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 2 2 1965
JOHN F. DAVIS, CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 598

GERHARD BRASCH,
Petitioner,
vs.
STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR REHEARING

GERHARD BRASCH,
3035 Gough Street, Apt. 8,
San Francisco, California 94123,
Petitioner in propria persona.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Grounds for rehearing	2
Conclusion	7

Table of Authorities Cited

Cases	Pages
Brinkerhoff-Faris v. Hill, 281 U.S. 673	7
Hickman v. Taylor, 329 U.S. 495	6
Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc., 312 U.S. 287	5
Oppenheimer v. Deutchman (1955), 132 C.A. 2d Supp. 875, 281 P. 2d 650	3
United States v. Ohio Power Co., 353 U.S. 98	7
Yick Wo v. Hopkins, Sheriff, 118 U.S. 356	2

Constitutions

United States Constitution, Fourteenth Amendment	3, 5, 7

Rules

Rules of the Court, Rule 23(f)	7

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1965

No. 598

GERHARD BRASCH,
Petitioner,
vs.
STATE COMPENSATION INSURANCE FUND,
STATE PERSONNEL BOARD,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of this Court's order dated December 6, 1965, denying the petition for a writ of certiorari to the Supreme Court of the State of California, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

I.

The respondent State Compensation Insurance Fund asked this Court to deny the petition of petitioner for a writ of certiorari because "no Federal question was properly raised or preserved in the State Courts".

This Court held in *Yick Wo v. Hopkins, Sheriff,* 118 U. S. 356, 373 that the equal protection of the laws extends to all persons "by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States". Petitioner explained in his petition and in his reply brief that he could not find an attorney willing to protect his Constitutional rights in a court of law. He respectfully submits that the effect of the denial of his petition is a classification of petitioners who ask this Court to review the denial of their claimed rights under the Fourteenth Amendment by the highest court of a state into two groups; one, entitled to a writ of certiorari, because its attorneys had claimed the denial of these rights timely and properly in the trial court, and another one, not entitled to a writ of certiorari, the group of petitioner, a layman, who could not find an attorney willing to file a complaint in his cause, whose complaint was his first endeavor in drafting a complaint, and whose attorneys who then accepted his case did nothing to protect his rights and returned his litigation papers to him only after the Municipal Court had entered a Judgment of Dismissal with Prejudice without opinion upon ex parte motion of the respondent

State Compensation Insurance Fund against him and a Judgment of Default by Court against them for the return of his litigation papers. Since, however, this Court held that the guarantees of protection contained in the Fourteenth Amendment extend to all persons, petitioner respectfully submits that the denial of his petition cannot be reconciled with the cited holding of this Court and that it will result in an unjustifiable discrimination between persons petitioning this Court for a writ of certiorari of the denial of like Constitutional rights unless this conflict is resolved.

II.

In moving for a Judgment of Dismissal with Prejudice against petitioner the respondent State Compensation Insurance Fund stated in its memorandum of points and authorities that in *Oppenheimer v. Deutchman,* 1955, 132 C. A. 2d Supp. 875, 281 P. 2d 650 "the action was dismissed with prejudice on ex parte motion of Defendant", whereas the Superior Court in this case had stated several times that the court below, while properly dismissing the action, should not have done it *with prejudice* and that the words "with prejudice" must be stricken from the judgment. The judge in the Municipal Court signed the draft of the Judgment of Dismissal *with Prejudice* prepared by the respondent but gave no grounds for entering this judgment even though it was not in accord with the decision in the *Oppenheimer* case. In his notice of appeal and in his briefs in the Appellate

Division of the Superior Court petitioner pleaded the denial of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States by the respondents. But the Superior Court, the District Court of Appeal and the Supreme Court of the State affirmed the Judgment of Dismissal with Prejudice without stating why petitioner should be forever barred from having a new trial and submitting his claim of the denial of his state and federal rights to a jury.

Petitioner respectfully submits that this Court should grant his petition for rehearing because the denial of his petition is in conflict with the decisions of this Court stated on page 31 of his petition for a writ of certiorari since its effect is an affirmation of the Judgment of Dismissal *with Prejudice,* a bar to petitioner from ever asserting his claim of the violations of his rights under the Fourteenth Amendment by the respondents, and a reward to the respondent State Compensation Insurance Fund for having successfully forever taken away the right of petitioner of asserting his claim of the denial of his Constitutional rights in a trial court by means of its false citation.

III.

In further support of his petition for rehearing petitioner respectfully submits that his case requires the settlement of substantial federal questions in the public interest, namely, that the respondents denied him the equal protection of the laws and deprived him of property for public use without compensation and

hearing in violation of the provisions of the Fourteenth Amendment, which serious charges the respondents never disputed. Concerning substantial federal questions this Court declared that it is of prime importance that no Constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality and that the State courts must act in subordination to the duty of this Court to enforce Constitutional liberties even when denied through spurious findings of fact in a state court; *Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc.*, 312 U. S. 287, 293, 298-299.

IV.

Petitioner petitioned in vain the State Personnel Board, the Governor, the Attorney General, and members of the State Legislature for redress of his grievances, explained in his complaint; no hearing was held. He filed a complaint in the Municipal Court in propria persona. The respondent State Compensation Insurance Fund demurred. Attorneys who then accepted his case promised him to plead the denial of his rights under the Fourteenth Amendment by the respondents in an amendment to his complaint. They asked the court for two extensions of time, but they filed no amendment, granted the Attorney General, counsel for the respondent State Compensation Insurance Fund, in an unfiled stipulation thirty days time to plead to the amended complaint of petitioner without informing him of this action while he was their client, and returned his litigation papers to

him only after the Municipal Court had ordered them to return them. Petitioner submits that the action of his former attorneys in his case cannot be reconciled with the historic concept that a lawyer is an officer of the court and that he is bound to work for the advancement of justice, while faithfully protecting the rightful interests of his clients; *Hickman v. Taylor,* 329 U. S. 495, 510.

In his appeal and in his briefs in the Appellate Division of the Superior Court petitioner, again in propria persona, pleaded the denial of his rights under the Fourteenth Amendment. His appeal was denied without opinion.

Petitioner respectfully submits that he raised the federal claim at the first opportunity available to him and that the Judgment of Dismissal with Prejudice without opinion, the denial of his petition for a hearing without opinion by the Supreme Court of the State of California, and the refusal of the executive, administrative and legislative agencies of the State to provide redress of his grievances violates his right to due process of law, in its primary sense of an opportunity to be heard and to defend his substantive rights in a trial court.

> "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded

to him some real opportunity to protect it." *Brinkerhoff-Faris v. Hill,* 281 U. S. 673.

V.

Petitioner urges this Court to grant his petition for rehearing because otherwise the benign provisions of the Fourteenth Amendment, which are guaranteed to all persons will become unenforceable, moot and of academic interest only in his case for the reasons set forth, and he submits furthermore that Rule 23(f) of the Rules of this Court must yield to the intent of the Fourteenth Amendment to the Constitution of the United States and the interests of justice. "The interest in finality of litigation must yield when the interests of justice would make unfair the strict application of the Rules of this Court." *United States v. Ohio Power Co.,* 353 U. S. 98.

CONCLUSION

For the reasons set forth above it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the Supreme Court of the State of California.

Dated, San Francisco, California,
December 20, 1965.

Respectfully submitted,
GERHARD BRASCH,
Petitioner in propria persona.

Certificate of Petitioner

I, Gerhard Brasch, petitioner in propria persona, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

Dated, San Francisco, California,
December 20, 1965.

Gerhard Brasch,
Petitioner in propria persona.